



**Gatumu v Munge & another (Environment and Land Case
E030 of 2021) [2024] KEELC 5079 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5079 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE E030 OF 2021**

**A KANIARU, J
JUNE 20, 2024**

BETWEEN

NDWIGA GATUMU APPLICANT

AND

LUCY MUTHANJI MUNGE 1ST RESPONDENT

POLLY WAMBETI MURIITHI 2ND RESPONDENT

RULING

1. I am called upon to make a determination on a motion on notice dated 21.11.2022 and filed in court on 10.1.2023. It is expressed to be brought under sections 3, 3A and 6 of the *Civil Procedure Act* (Cap 21), Order 40 Rules 1 and 2 of the *Civil Procedures Rules, 2010*, and all other enabling provisions of law. The motion came with five (5) prayers which are as follows:
 - i. That the honourable court be pleased to grant an order of stay of proceedings in Embu CM Succession cause No 65 of 2019 (*Lucy Muthanji Munge and Polly Wambeti Muriithi Vs Ndwiga Gatumu*) pending the hearing and determination of the instant suit.
 - ii. That the respondents either by themselves, their agents and/ or servants be restrained by an order of injunction from evicting and/ or interfering with the applicant's peaceful occupation of land parcel No Ngandori/ Ngovio/1708 pending the hearing and determination of the main suit herein.
 - iii. That the respondents either by themselves, their agents and/or servants be restrained by an order of injunction from picking the applicants tea bushes, destroying the applicants trees and other crops or performing any other act of destruction on land parcel No Ngandori/ Ngovio/1708 pending the hearing and determination of the main suit.



- iv. That the honourable court be pleased to grant an order of inhibition against land parcel No Ngandori/ Ngovio/1708 pending the hearing and determination of the suit herein.
 - v. That costs of this application be provided for.
2. The motion is premised on the grounds, inter alia, that the applicant is seeking adverse possession of land parcel No Ngandori/ Ngovio/1708 (disputed land hereafter) and that the respondents are the administrators of the estate of Njogu Mwenda Mwea who is the registered owner of the land; that the applicant has placed a caution on the register of the disputed land, which caution the respondents are seeking to remove via an application filed in their on-going succession cause; that the applicant is opposing that application and that the issue of ownership of the disputed land should be resolved first before the caution is removed; that the proceedings in the succession cause are at an advanced stage and unless they are stayed, the proceedings before this court will be rendered nugatory; that the applicant has been in possession of the disputed land since 1979 after purchasing it from Njogu Mwenda Mwea and that the respondents have, through acts of intimidation and harassment, threatened to evict the applicant from the disputed land and have started cutting down trees, destroying crops, and picking the applicant's tea on the disputed land.
 3. The applicant averred that the tea on the disputed land is his only source of income and he is going to suffer irreparable loss unless the respondents are restrained. He averred further that the disputed land may be sold if the caution is removed; hence the need to grant an order of inhibition.
 4. The motion came with a 19-paragraph supporting affidavit which mainly elaborates the grounds upon which it is anchored.
 5. The respondents made their response via a replying affidavit dated 9.5.2023 and filed on 10.5.2023. According to the respondents, the applicant is a cousin to the seller - Njogu Mwenda Mwea - who is the deceased husband to the 1st respondent and father to the 2nd respondent. He does not, they deposed, live on the disputed land but on parcel No Ngandori/ Ngovio/1707 which was sold to him by the deceased.
 6. The respondents denied that the applicant entered into any sale agreement with the deceased and they deposed that were it even true that such an agreement was made, the same has lost legal validity through effluxion of time as the six year period within which such validity can subsist has expired. The documents that the applicant is seeking to rely on were also said to be forged.
 7. The respondents deposed that the original land parcel was Ngandori/ Ngovio/824 and the applicant bought half, and that then gave rise to subsequent subdivision. The subdivision in turn gave rise to two resultant parcels Ngandori/ Ngovio/1707 and Ngandori/ Ngovio/1708. The applicant became registered owner of parcel no 1707 while parcel no 1708, the disputed land, remained in the name of Njogu Mwenda Mwea.
 8. It was denied that the applicant has tea bushes on the disputed land; with the respondents deposing that they have their own tea on it, which they harvest, and that the applicant has been harassing them.
 9. The application was canvassed through written submissions. The applicant's submissions were filed on 25.9.2023. On whether the succession proceedings in the lower court should be stayed, the applicant submitted that it is imperative that an order of stay be granted as the subject matter of the succession proceedings is the same disputed land which is the subject matter here. For tenor and/ or effect, section 6 of the *Civil procedure Act* (cap 21) was cited and quoted. The said section is about the subjudice rule and it debars a court of law from proceeding with a matter with similar issues or character to another suit pending before itself or another court.



10. The applicant herein stressed that the parties in the succession proceedings are the same ones in this suit and are litigating over the same title – which is land parcel No Ngandori/ Ngovio/1708.
11. On the issue of injunction, it was stressed that the applicant has established a prima facie case by dint of being in occupation of the land, cultivating it, and the fact that the respondents would wish to evict him. It was further averred that the applicant stands to suffer irreparable loss that cannot be adequately recompensed with damages. It was emphasized that the applicant's livelihood will be ruined. The balance of convenience was also said to lean in favour of the applicant. It was pointed out that the applicant will suffer greater prejudice if the orders are declined. The respondents on the other hand were said to be unlikely to suffer prejudice if the orders are granted. The case of *Agness Nyang'anyi Omwanba Vs Samuel Bosire Nyaruna* (2022) eKLR was cited to persuade the court.
12. It was also further submitted that it is necessary to grant an order of inhibition. In this regard, Section 68 (1) of the *land registration act*, which is about granting such an order, was cited and the case of *RW Vs JMV* (2022) eKLR was sought to be relied on.
13. The respondents' submissions were filed on 7.12.2023. The application under consideration was said to be bad in law, misconceived, a non-starter, and an abuse of the court process. The respondents were said to be at risk of being denied enjoyment of quiet possession, and use of the disputed land. It was submitted too that no tangible grounds have been advanced to warrant a grant of stay of succession proceedings in the lower court. This court was also said to lack the requisite jurisdiction to stay succession proceedings as the legal mandate to do so reposes in the high court. On the issue of the order of inhibition the applicant was faulted for not proffering sufficient reasons for issuance of the same. It was pointed out that an order of caution already exists on the register of the disputed land. A caution operates like an order of inhibition. The respondents wondered why the court is being called upon to issue an order of a similar nature.
14. On injunctions, the applicant was said to have failed to demonstrate the necessary tests for granting of the same. The sale agreement the applicant is said to be relying on was faulted for being unenforceable in law because of the fact of limitation of time. Further, on the issue of irreparable loss, it was submitted that the applicant can sufficiently be compensated with damages.
15. Several cases, including *Ace Engineering and Building Contractors Ltd Vs National Bank of Kenya Limited* (2019) eKLR, *Giella Vs Cassman Brown* (1973) EA 358, *Florence Khayanga Musanga Vs Transnational Bank and Another* (2020) eKLR and *Nguruman Limited Vs Jan Bonde Nelson and 2 others* (2014) eKLR, among others, were cited to drive home the various points that were made.
16. I have considered the application as filed, the response made to it, rival submissions, and the entire matter generally.
17. I will begin by pointing out that the order of stay of lower court succession proceedings cannot be granted by this court as it does not have jurisdiction to do so. In this regard, I agree with the respondents when they point out that this court lacks jurisdiction to grant the order. It is the high court that has the mandate to issue such an order. I will say no more of this.
18. On the issue of the order of inhibition, I again agree with the respondents that an order of a similar nature – namely a caution – was said to be already extant on the land register. The applicant should not be seeking an order of inhibition when a caution already exists. If the respondents are contesting the existence of the caution in the succession proceedings, the applicant should counter that in the same proceedings. It is superfluous to issue an order of inhibition when an order of caution already exists.



19. Then there are the prayers of injunction. These ones are properly made and this court can grant them if merited. But there is the problem of certainty. The respondents said that the applicant resides on land parcel No Ngandori/ Ngovio/1707 sold to him by 1st respondent's late husband and not on land parcel No Ngandori/ Ngovio/1708. Infact the respondents averred that they are the ones living on parcel No 1708. The uncertainty surrounding the issue of who resides where can only be resolved during trial. An order of injunction is always required to be clear and certain. Where the facts surrounding its issuance are fuzzy, it cannot be granted. Moreover, the court has not been persuaded that damages would not be an adequate remedy in the matter. The loss sought to be prevented is clearly quantifiable in monetary terms. It has not been shown that the respondents cannot pay damages.
20. The upshot, in light of the foregoing, is that the applicant has not been able to demonstrate the merits of the application herein and the same is therefore hereby dismissed. Costs to be in cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH JUNE, 2024.

In the presence of Ms Muthoni Ndeke for Ms Mukami, Njiru Mbogo for respondent/ defendant.

Court Assistant - Leadys

A.K. KANIARU

JUDGE

